

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 98-758

June 22, 1999

PUBLIC UTILITIES COMMISSION
Investigation into Use of Central Office
Codes (NXXs) by New England Fiber
Communications LLC d/b/a Brooks
Fiber Communications

ORDER ADOPTING
FACTUAL AND LEGAL
CONCLUSIONS;
PROPOSAL PROCESS
FOR RESOLUTION

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. SUMMARY OF ORDER

In this Order we make Factual and Legal Conclusions proposed in our Order issued on December 2, 1998. We also set forth a proposal, and establish a procedure, for resolving the issues in this case.

II. INTRODUCTION

On December 2, 1998, the Commission issued an order making certain "findings" concerning factual issues in this case. That Order also set forth certain *revised proposed* "Factual and Legal Conclusions" and invited parties to address those proposed conclusions in briefs that were filed on December 22, 1998. On January 13, 1999, the Commission held a hearing and oral argument at which parties discussed possible resolutions for the case and their desire to conduct negotiations.

On February 16, 1999, we issued an Order Addressing Further Proceedings. That Order delayed making the proposed Factual and Legal Conclusions contained in the December 2nd Order, and requested the parties to report on the progress of negotiations on the 15th of each month. To date, we have received three reports. In very general terms they report some possible progress about general concepts but no specific resolution.

As described in detail in our previous orders, much of our concern in this investigation is about the fact that Brooks is using NXX codes for gathering of traffic that is destined for the Internet, which Brooks has labeled as local. In the Notice and in our December 2nd Order we proposed a conclusion that the traffic that originates outside of Brooks's Portland area exchange is interexchange, and that Brooks is not offering local exchange service in those areas. We proposed a further conclusion that a carrier that is offering interexchange service does not require central office codes (NXXs) to provide that service.

We are prepared to make the Factual and Legal Conclusions that we proposed in revised form in the December 2, 1998 Order. We refrained from making those conclusions following the hearing in this case because the parties stated that they were prepared to negotiate a settlement that was consistent with statements made at the hearing and within the parameters set forth in our Orders. Parties have had a full opportunity through briefs filed on December 22, 1998, and at the hearing, to convince us that we should not adopt the proposed Factual and Legal Conclusions, but they have not presented any reason why we should not adopt them.¹ For the reasons stated in Conclusion No. 5, we specifically disagree with Brooks's arguments that its "FX-like" service is local. We also do not agree with Brooks's argument that there is anything in the interconnection agreement with Bell Atlantic that does not define "interexchange" and "local" traffic in the same way as our rules. Brooks argues that the definitions of "rate center" and "routing point" in the interconnection agreement are significant. We do not agree. Those definitions are not used in the agreement and do not act to undermine the clear definitions of "interexchange" and "local" traffic that are included in and actually used in the agreement.

Accordingly, we not adopt the proposed Factual and Legal Conclusions propose in the December 2, 1998 Order. Both the Facts (which we adopted in our December 2, 1998 Order), and the Factual and Legal Conclusions are set forth as Appendices A and B of this Order. Because we wish to avoid any harm to customers during the interim period, we require Bell Atlantic to continue to deliver the traffic which originates in Bell's exchanges to the Brooks switch in Portland, as Bell has done since the interconnection agreement went into effect. This will allow Bell Atlantic customers to continue to reach ISPs served by Brooks in the same manner as they currently do. We will require the existing arrangements to remain in effect until we approve a resolution of this case.

III. RESOLUTION - PROCEDURE

Below we state a specific proposal for resolution of this case. Parties are invited to comment on this proposal. They are also free to make any other proposal, including variants on the proposal below, or to propose any of the possible resolutions outlined in Parts III and III of the February 16th Order. A copy of the February 16th Order is attached as Appendix C. All proposals must be consistent with the Factual and Legal Conclusions that we have adopted in this Order, and the Findings we made previously. Specifically, they must be consistent with our conclusions that the traffic gathered by Brooks from locations outside of its Portland Area Exchange is interexchange, not local, that the interconnection agreement between Brooks and Bell Atlantic also defines that traffic as interexchange, so that reciprocal compensation does not apply. As in the case of our proposal, any proposal by a party may also take into account that the traffic is

¹ We first proposed Factual and Legal Conclusions in our Notice of Investigation issued on October 6, 1998. Parties filed comments addressing those conclusions and we made a number of changes, mostly non-substantive, in the December 2nd Order.

destined for the Internet and that a special rate for such traffic may be appropriate under the policy stated in 35-A M.R.S.A. § 7101(4).

IV. RESOLUTION – SPECIFIC PROPOSAL

Under this plan, all ILECs would be required to offer a special rate to internet service providers (ISPs) for the transport of interexchange internet traffic, as defined in the December 2, 1998 Order. The rate would not be available to ISPs that offer voice services over the internet. CLECs would be permitted to offer the same kind of rate, based on the same pricing principles described below. CLECs would also be able to purchase the service from the ILECs at a wholesale discount and resell it to ISPs.

A special price for state-wide access to the internet is justified by the policy stated in 35-A M.R.S.A. § 7101(4). The pricing principles we set forth here are justified by the fact that internet traffic may be viewed as incremental to traditional voice. We propose that transport for internet traffic shall be priced at lone-run marginal cost and that pricing should not include a contribution to the cost of commonly-used non-traffic-sensitive loop facilities, i.e., the equivalent of the common line charge that is part of wholesale access rates or the support for the local loop that is part of retail toll rates. The rate should contain non-usage-sensitive options. Any usage-sensitive rate should be busy period-sensitive. The service should not use more than one statewide code (NXX) per carrier. (ILECs should be able to use one code jointly.) The service should be accessible toll-free by end-users calling an ISP that has subscribed to the service.

V. COMMENT DEADLINE

Parties that wish to file comments addressing the proposed resolution contained in this Order or who wish to file their own proposals shall do so on or before June 30, 1999.

Dated at Augusta, Maine, this 22nd day of June, 1999.

BY ORDER OF THE COMMISSION

Raymond Robichaud
Assistant Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Diamond

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Civil Procedure, Rule 73, et seq.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.